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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

No. 569

HOWARD CURRY,

Petitioner,

vs.

THE FLORIDA BAR,

Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS

1. WHETHER A LAWYER, WHO IN A DISCIPLINARY PROCEEDING APPEARS AND TESTIFIES BEFORE A GRIEVANCE COMMITTEE OF THE FLORIDA BAR, AND BEFORE A REFEREE OF THE FLORIDA BAR, WITHOUT RAISING ANY PERSONAL PLEA AGAINST SELF INCRIMINATION, CAN LATER ASSERT THE JUDGMENT AND PENALTY IMPOSED BY THE SUPREME COURT OF FLORIDA IS INVALID,

THE LAWYER NOW CLAIMING THAT THE INTEGRATION RULE REQUIRED HIM TO TESTIFY BEFORE THE GRIEVANCE COMMITTEE UNDER THE THREAT OF BEING CITED FOR CONTEMPT.

2. DOES THE BOARD OF GOVERNORS OF THE FLORIDA BAR HAVE TO BE CONSTITUTED IN SUCH A FASHION THAT THE NUMBER OF GOVERNORS FROM EACH JUDICIAL CIRCUIT MUST CORRESPOND TO THE NUMBER OF LAWYERS IN EACH JUDICIAL CIRCUIT ON THE "ONE MAN — ONE VOTE" RULE?

3. WHERE PETITIONER CLAIMS THE DENIAL OF DUE PROCESS OF LAW, IS THE BURDEN UPON PETITIONER TO SHOW FROM THE RECORD IN WHAT MANNER DUE PROCESS WAS DENIED PETITIONER?

STATEMENT

Petitioner's statement attempts to make factual the very conduct which is controverted. Petitioner was not required to testify and give evidence against himself (PP 10, 11)*; nor was the petitioner Curry called over his vehement protests as a witness against himself (PP 13).

When petitioner appeared before the Grievance Committee of The Florida Bar, he was not required to testify against himself. When the hearing began, the following occurred:

"MR. WAITZKIN: You are Howard Curry?

"MR. CURRY: Yes, sir.

*References are to pages in petitioner's petition.

"MR. WAITZKIN: And you are an attorney?

"MR. CURRY: Yes, sir.

"MR. WAITZKIN: Your name is Marta Larrazabal?

"MISS LARRAZABAL: Yes.

"MR. WAITZKIN: **Mr. Curry, you needn't be sworn if you don't want to. You may make your statement under oath or not.**

"MR. CURRY: **I have nothing to hide. If that is your procedure, it is all right with me.**

"(At this point Mr. Curry and Miss Larrazabal were both sworn to tell the truth and to secrecy.)"

(Transcript of proceeding before Grievance Committee admitted by stipulation as Complainant's The Florida Bar, Exhibit 1, See R 41, 42)

Thereafter petitioner was called as a witness and testified without invoking the Fifth Amendment. The only objection raised by petitioner during this hearing related to the letters he had mailed out to 800 persons for whom he had prepared tax returns:

"Well, I would like to know what right this Committee has to invade privileged communications. I spent three months on that letter and I know every word of it. It is perfect and there isn't a thing wrong with it. (idem)

* * *

"I challenge the jurisdiction of The Florida Bar to invade a privileged communication. This opens the door wide. This means that you can come in and look at everything I ever wrote. I wrote this to a client and for very good reason which I will be glad to tell you why I did that.

"MR. WHITE: Mr. Curry, wouldn't you say that if this is a privileged communication that the privilege has obviously been waived by the client turning it over to the Bar?

"THE WITNESS: I want to know how the Bar got it. Did a client turn it over to the Bar?

"MR. ALBOUM: How else could we get it?

"THE WITNESS: I don't know." (idem)

When petitioner appeared before the Referee, he did not raise any personal plea against self incrimination. The Motion to Dismiss, filed by his attorney, claimed respondent had obtained immunity from any type of penalty or forfeiture by being required to testify before the Grievance Committee (R 41, PP 11-14).

REASON FOR NOT GRANTING THE WRIT

The decision below is not in direct conflict with the decision of this Court in **Spevack v. Klein,** 385 U.S. 511, 17 L. Ed. 2d 574, 87 S. Ct. 625; and **Garrity v. State of New Jersey,** 385 U.S. 493, 17 L. Ed. 2d 562, 87 S. Ct. 625 (PP 21). Spevack involved a proceeding to discipline a member of the New York Bar for professional misconduct. Of the

various charges made, only one survived, viz., the refusal of Spevack to honor a subpoena duces tecum served upon him in that he refused to produce the demanded financial records and refused to testify at the judicial inquiry, for which refusal Spevack was disbarred. Spevack's sole defense was that the production of records and his testimony would tend to incriminate him. In reversing Spevack's conviction of disbarment, the Supreme Court said:

> "***[W]e conclude that Cohen v. Hurley should be overruled, that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it***." (P. 627)
>
> * * *
>
> "We said in Malloy v. Hogan:
>
> > 'The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty * * * for such silence.' 378 U.S. at 8, 34 S. Ct. at 1493." (P. 628)

When petitioner Curry was served with a subpoena to appear and testify before the Grievance Committee of The Florida Bar, petitioner had the choice of complying or refus-

ing to comply therewith. If he failed to honor the subpoena, he might have been cited for contempt. If he had been cited for contempt, then, at any contempt hearing, he might have raised the plea against self incrimination. Petitioner elected to comply with the subpoena and appear before the Grievance Committee.

In contrast to Spevack, petitioner

1) Was not disciplined for refusing to appear or testify before the Grievance Committee;

2) Was not required to testify against himself;

3) Did not timely refuse to testify on the ground that his answers would tend to incriminate him.

Petitioner's attorneys assert that petitioner carefully preserved his constitutional rights in his Motion to Dismiss and the Stipulation between petitioner and The Florida Bar in the proceeding before the Referee. In the Motion to Dismiss, petitioner's attorneys, as grounds for said motion, said:

> "2). That assuming arguendo that (i) the Florida Bar had jurisdiction over the respondent and (ii) that the respondent was guilty of some professional impropriety, a fact which is vehemently denied, by requiring the respondent to testify before the Grievance Committees of the Eleventh Judicial Circuit, the respondent has obtained immunity from any type of penalty or forfeiture, including the revocation of his license to practice law. See § 932.29, F.S.A. and **State Bever-**

age Department of Florida v. State of Florida ex rel. Zucker, (Fla. App. 3rd 1960) 116 So. 2d 640." (PP 11)

Zucker is inapplicable. Zucker obtained immunity under F.S. §932.29 by reason of which it was unnecessary for Zucker to invoke the plea against self incrimination. The Supreme Court of Florida found that petitioner obtained no statutory immunity and that petitioner relies upon immunity under the Fifth and Fourteenth Amendments of the Constitution of the United States and § 12 of the Declaration of Rights of the Florida Constitution. Any "constitutional immunity" petitioner might have obtained would have come only if he had been compelled to testify against himself after invoking the plea of self incrimination. This did not occur. Neither at the Grievance Committee hearing nor at the hearing before the Referee did petitioner refuse to testify on the ground that his answers would tend to incriminate him. The motion to dismiss the complaint filed by petitioner's attorney before the Referee is not even such a plea because the privilege cannot be claimed for the witness by his counsel. **Ziegler v. United States** (9th Cir. 1949), 172 F. 2d 439, cert. den., 338 U.S. 822, 94 L. Ed. 499, 70 S. Ct. 68; **Schoeps v. Carmichael** (9th Cir. 1949), 177 F. 2d 391, cert. den. 339 U.S. 914, 94 L. Ed. 1340, 70 S. Ct. 566. The applicable principle is succinctly stated in **United States v. Murdock,** 284 U.S. 141, 76 L. Ed. 218, 52 S. Ct. 63, to be:

> "The privilege of silence is solely for the benefit of the witness and is deemed waived unless invoked. United States ex rel. Vajtauer v. Com'r. of Immigration, 273 U.S. 103, 113, 47 S. Ct. 302, 71 L. Ed. 560." (p. 64)

Petitioner appeared and testified before the Grievance Committee and the Referee without asserting his constitutional right to remain silent.

In the Supreme Court of Florida petitioner's attack on the Board of Governors of The Florida Bar was:

> "Where pursuant to reapportionment of Board of Governors of Florida Bar (in the matter of The Florida Bar, Fla., 175 So. 2d 530) the Board of Governors **appointed** additional members to fill said newly created offices, **instead of election** by the active members of The Florida Bar, was the enlarged Board of Governors unconstitutional and unlawfully constituted and any action taken thereby void?" (PP 18, 19)

Petitioner, by point II of this petition, now says that "he has been deprived of equal protection of the law because of the malapportionment of the governing body of the Florida Bar . . ." (PP 16); that

> Petitioner, a lawyer from the eleventh circuit, had an inalienable right to be adjudicated by a geographically determined Board of Governors of the Integrated Bar, that was lawfully constituted and fairly apportioned in accordance with the adjudications of this Court in Reynolds v. Sims, 377 U.S. 533, 12 L. Ed. 2d 506, 84 S. Ct. 1362, Swann v. Adams, 385 U. S. 440, 17 L. Ed. 2d 501, 87 S. Ct. 569 and their progeny." (PP 23)

The "equal protection" clause of the Constitution simply means that no person or class of persons shall be denied the protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. Petitioner does not contend that he was discriminated against as compared to other lawyers in the Eleventh Judicial Circuit of Florida, but that the lawyers of the eleventh circuit were discriminated against as compared to other circuits, because the Board was not geographically proportioned on the "one man—one vote" basis. Petitioner then implies that if there had been more Miami lawyers on the Board, the Board might not have recommended a six months' suspension (PP 24).

Respondent submits that the "one man—one vote" rule is inapplicable; however, when the question of the Board's apportionment was raised at the time of the petition to enlarge same was considered, Justice O'Connell, concurring specially, said:

> "The Florida Bar operates between its annual meetings through a Board of Governors elected directly by the lawyers of Florida under an apportionment formula that might well satisfy the federal courts." **In Re The Florida Bar,** (Fla. 1966), 134 So. 2d 649.

Assuming arguendo, but not conceding, that the Board is malapportioned, the petitioner was not denied "equal protection" in that the Integration Rule of The Florida Bar provides:

> "(iii) Filing. If the respondent is found guilty and the judgment includes public reprimand, sus-

pension from practice or disbarment, the Executive Director shall file the entire record with the Clerk of the Supreme Court." (11.06(9)(c), (PP 9) The Integration Rule further provides:

"Rule 11.11: Appellate Review

All judgments entered in proceedings under these Rules of Discipline shall be subject to appeal by petition to the Supreme Court in the following manner:

"(1) * * *

"(2) * * *

"(3) Procedure. Appeals shall be only in accordance with the following procedure.

"(a) Petition for review. The appeal shall be commenced by filing a petition for review with the Supreme Court and two copies thereof with the Executive Director within 30 days after entry of judgment or order to be reviewed. * * * The filing of the petition and copies is jurisdictional, and failure to file the petition and such copies within such 30-day period shall preclude an appeal.

"(b) Record on appeal. If the appeal is from a judgment of the Board of Governors, the Executive Director shall forward the entire record to the Supreme Court within ten days after the filing

with the Executive Director of a copy of the petition for review."

"(c) * * *

"(d) * * *

"(e) * * *

"(f) Judgment of Supreme Court. After review the Supreme Court shall enter an appropriate order or judgment. If no appeal is taken from a judgment or order entered under these rules, and if a certified copy thereof has been filed with the Court, the Court shall enter a judgment thereon.

"(4) * * *

"(5) * * *

"(6) * * *"

The legal status of the "judgment" entered by the Board of Governors of The Florida Bar, pursuant to Integration Rule, has been described by the Supreme Court of Florida in the following language:

"[1] The report of The Board of Governors of The Florida Bar styled "Judgment" is in effect a report akin to a Master's Report in a chancery matter and **the final orders or judgments in cases of this kind under the Florida Constitution must be entered by this court.**

> "[2] We, therefore, have examined the record, the briefs and respondent's Petition for Review and the "Judgment", and think that the Board of Governors properly considered respondent's prior transgressions in making final disposition in this case." **The Florida Bar v. Swidler,** Fla. 1967, 199 So. 2d 713, 714.

See also **The Florida Bar v. Abramson,** (Fla. 1967), 199 So 2d 457, 460; **Application of Harper,** (Fla. 1956), 84 So. 2d 700, 706.

The judicial act, whether a petition for appellate review is filed or not, which imposes discipline on an attorney is the judgment of The Supreme Court, not the "judgment" of the Board of Governors. The punishment imposed by the Supreme Court of Florida may be the punishment recommended by the Board of Governors, e. g. **The Florida Bar v. Taylor** (Fla. 1964), 167 So. 2d 729; or a harsher punishment THAN THAT recommended by the Board of Governors, e. g. **The Florida Bar v. Benton** (Fla. 1963), 157 So. 2d 420; or a lesser punishment than that recommended by the Board of Governors, e. g. **The Florida Bar v. Bright** (Fla. 1964), 165 So. 2d 747; **The Florida Bar v. Swanson** (Fla. 1965), 172 So. 2d 827.

The judgment from which this petition for writ of certiorari is taken is the judgment of the Supreme Court of Florida, 211 So. 2d 169 (A 1-11), not the "recommended judgment" of the Board of Governors of The Florida Bar. The judges of the Supreme Court of Florida are elected state-wide, so the judicial act taken herein does not violate the "one man—one vote" concept.

Petitioner contends that for the "judgment" recommended by the governing body of The Florida Bar to be valid, it must affirmatively reflect that the requirements of Rule 11.06(9)(c)(i) were complied with (PP 25). **Petitioner does not contend that the procedure provided for by said rule was not followed.**

The Florida Bar was integrated on June 7, 1949 by order of the Supreme Court of Florida. On December 6, 1955, the Supreme Court of Florida adopted a completely amended integration rule. The Florida Bar is governed by and operates under such amended integration rule. When the Supreme Court of Florida considered the petition of the Florida State Bar Association praying for a rule integrating The Florida Bar, the Supreme Court of Florida said that it had the inherent power to integrate the Bar of Florida by rule of court. **Petition of Florida State Bar Association,** 40 So. 2d 902.

Rule 11.03 of the Integration Rule provides:

> "The jurisdiction of the Supreme Court shall be administered in the manner hereinafter stated. The following entities are hereby designated as agencies of the Supreme Court for this purpose and with the following responsibilities, jurisdiction and powers:
>
> "(1) The Board of Governors of The Florida Bar. The Board of Governors of The Florida Bar is assigned the responsibility of maintaining high ethical standards among al its members. The Board of Governors of The Florida Bar shall supervise

and conduct disciplinary proceedings in accordance with the provisions of these rules."

Since the Grievance Committees and the Board of Governors of The Florida Bar are agencies of the Supreme Court, the members thereof may be considered to be public officers performing an administrative function for the Supreme Court of Florida.

> "Whether created by or pursuant to statutes or by court rules, integrated bars have common characteristics of being organized by or under the direction of the state, and of being under its direct control; and in effect such bars are governmental bodies." 7 am. Jur. 2d, Attorneys at Law, § 7, page 47. See also the annotations in 114 A.L.R. 161, 151 A.L.R. 617.

> "The general rule that in the absence of evidence to the contrary, public officers will be rebuttably presumed to have properly performed their duties and not to have acted illegally, but regularly and in a lawful manner, is usually applied when regulations, decisions, or orders of an administrative officer or agency, acting within the limits of the jurisdiction conferred by law, are challenged in court. Where there is no right to a trial de novo, the burden of proving otherwise is upon the party complaining unless a statute provides to the contrary." 2 Am. Jur., Administrative Law, § 748, pages 647, 648.

In its judgment, the one from which petitioner seeks this writ of certiorari, the Supreme Court of Florida found:

"The record reveals that all [procedural] steps were taken in this matter. In no way has Mr. Curry been deprived of notice and a hearing. His point has no merit." (App. 9)

Petitioner has not shown any denial of due process in regard to the judgment entered by the Supreme Court of Florida.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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